IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-619

UTAH POWER & LIGHT COMPANY, ET AL.,
Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, ET AL., *Respondents.*

No. 76-620

WESTERN ENERGY SUPPLY AND TRANSMISSION ASSOCIATES, ET AL., *Petitioners,*

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, ET AL., *Respondents.*

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF THE STATE OF UTAH AS AMICUS CURIAE IN SUPPORT OF PETITIONS FOR WRITS OF CERTIORARI

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BRIEF OF THE STATE OF UTAH AS AMICUS CURIAE IN SUPPORT OF PETITIONS FOR WRITS OF CERTIORARI

The State of Utah, appearing by its undersigned Attorney General, respectfully tenders this brief as *amicus curiae* for the consideration of the Court in support of the petitions for writs of certiorari in Nos.

76-619 and 76-620. The State supports the position presented therein and urges this Court to grant the petitions for writs of certiorari.

THE INTEREST OF THE STATE OF UTAH

The State of Utah is directly affected by the decision of the court below. With the exceptions of Alaska and Nevada, federal land ownership is more extensive in the State of Utah than in any other state. Under the prevention of the significant deterioration regulations, the State of Utah is deprived of its primary responsibility under the Clean Air Act to control ambient air quality within its boundaries. Specifically, 40 C.F.R. § 52.21(c)(3)(iv) (1976) of the regulations has the effect of delegating control of all lands within the State to federal land managers. Thus, Utah's ability to control its land use and economic development is substantially impaired, if not abrogated. For this reason, the Court should grant the petitions for writs of certiorari to determine the validity of § 52.21 (c)(3)(iv) of the regulations.

The court below declined to decide the validity of § 52.21(c)(3)(iv). If allowed to stand, the regulation would seriously interfere with the State's execution of the air quality management responsibilities vested in it by Congress. Moreover, the decision poses a threat to the economic development of substantial areas within the State of Utah. The State has a clear interest in seeking reversal of the decision below.

REASONS FOR GRANTING THE WRIT

The Clean Air Act from its inception in 1955 (69 Stat. 322-323), has preserved the right of each state to control its air quality. *Train* v. *Natural Resources*

Def. Council, 421 U.S. 60, 63-64 (1975). Section 52.21 (c)(3)(iv) of the significant deterioration regulations permits federal land managers to redesignate federal lands to a more restrictive classification independent of state control. This has the operative effect of depriving the State of Utah of its powers and responsibilities under the Clean Air Act. Thus, § 52.21(c)(3)(iv) is, in effect, an amendment to the Clean Air Act, rather than a regulation pursuant to the Act.[1]

The lower court declined to determine the validity of § 52.21(c)(3)(iv) holding it not yet ripe for review. Under the explicit provisions of the Clean Air Act the issue of the validity of § 52.21(c)(3)(iv) is ripe for review. Moreover, § 52.21 (c)(3)(iv) has a real and immediate impact on Utah's ability to regulate its air quality.

A. The States Have the Primary Responsibility for Assuring Air Quality Within Their Geographic Areas.

Throughout the history of the Clean Air Act, Congress has preserved the basic principle "that the prevention and control of air pollution at its source is the primary responsibility of States and local governments." Section 101(a)(3), 42 U.S.C. § 1857(a)(3); *Train* v. *Natural Resources Def. Council*, 421 U.S. 60, 64 (1975). Section 107(a), 42 U.S.C. § 1857c-2(a), provides that "[e]ach State shall have the primary responsibility for assuring air quality within the entire geographic area comprising such State . . . ." This Court recently reaffirmed the principle of State respon-

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[1] The 94th Congress had before it a bill to amend the Clean Air Act that would have given federal land managers authority similar to that provided in the regulations. S. 3219, 94th Cong., 2d Sess. (1976). The bill failed to pass into law.

sibility in *Hancock* v. *Train*, — U.S. —, 96 S.Ct. 2006 (1976) and *Union Electric Co.* v. *E.P.A.*, — U.S. —, 96 S.Ct. 2518 (1976).

Senator Muskie, a major proponent of the 1970 amendments to the Clean Air Act, presented to the Senate the Conference Committee's report amending the Act and discussed the importance of State control:

> I have been very much interested in preserving 'local option' features so that *State and local authorities would be able to pursue options among a broad array, seeking a possible way of controlling or preventing air pollution that is most responsive to the nature of their air pollution problem and most responsive to their needs.* In my judgment, the bill will give State and local authorities sufficient latitude in selecting ways to prevent and control air pollution. Senate Committee on Public Works, 93d Cong., 2d Sess., A Legislative History of the Clean Air Amendments of 1970, 137 (Comm. Print 1974) (emphasis supplied).

Section 52.21(c)(3)(iv) deprives the State of Utah from controlling and preventing air pollution contrary to explicit provisions of the Act, decisions of this Court, and Congressional intent.

B. The Regulations Have the Operative Effect of Divesting the State of Utah of Control Over Its Ambient Air Quality.

Section 52.21(c)(3)(iv) grants federal land managers the authority to independently reclassify federal lands to the more restrictive Class I designation. Federal lands comprise 66 percent of the total lands in the State of Utah.[2] Moreover, the checkerboard

[2] Bureau of Land Management, *Public Land Statistics* 10 (1975).

ownership pattern of the federal lands in Utah is such that there is no private or State land that is farther than twenty miles from federal lands. This enables federal land managers to be able to control *all* of the lands within the State. This result was acknowledged by the Administrator in his discussion of the regulations:

> [B]ecause of the small air quality increments specified for Class I areas, these levels can be violated by a source located many miles inside an adjacent Class II or III area. For example, a power plant which just meets the Class II increment for SO_2 could under some conditions violate the Class I increment for SO_2 60 or more miles away. Under the regulations promulgated below, a source could not be allowed to construct if it would violate an air quality increment either in the area where the source is to be located or in any neighboring area in the State. Therefore, wherever a Class I area adjoins a Class II or III area, *the potential growth restrictions . . . extends well beyond the Class I boundaries into adjacent areas* . . . . [I]t should be clear that the Class II or III increment could only be fully utilized toward the center of the area and that at the periphery, allowable deterioration will be dictated by the adjoining Class I area rather than the Class II or III increment. 39 Fed. Reg. 42512 (Dec. 5, 1974) (emphasis supplied) (App. B, 66a-67a).[3]

Federal land managers can thus exercise primary control over Utah lands contrary to the history of the Clean Air Act, the Act itself, and decisions of this

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[3] Reference is to the appendix in *Montana Power Company* v. *United States Environmental Protection Agency*, No. 76-529, a related petition for a writ of certiorari in this proceeding.

Court. The State of Utah, at best, is left with only secondary responsibility for managing the quality of ambient air within its borders.

C. Section 52.21(c)(3)(iv) of the Regulations Is Ripe for Judicial Review Under Section 307(b)(1) of the Clean Air Act.

The lower court declined to determine the validity of § 52.21(c)(3)(iv) deciding that the issue was not yet ripe for review. In reaching this conclusion, the lower court relied upon *Toilet Goods Ass'n* v. *Gardner*, 387 U.S. 158 (1967), a case involving judicial review under the Administrative Procedure Act, 5 U.S.C. § 701 *et seq.* Although the State believes that the issue is ripe for review even under the principles laid down in *Toilet Goods, supra*, judicial review in this proceeding is governed by § 307(b)(1), 42 U.S.C. § 1857h-5(b)(1), of the Clean Air Act. Accordingly, under § 307(b)(1), the lower court should have determined the validity of § 52.21(c)(3)(iv) of the regulations.

Section 307(b)(1) provides that,

> A *petition for review* of the Administrator's action in . . . promulgating *any implementation plan under section 110* of this title . . . may be filed only in the United States Court of Appeals for the appropriate circuit. Any such petition *shall be filed within 30 days from the date of such promulgation*, . . . or after such date if such petition is based solely on grounds arising after such 30th day. (emphasis supplied).

The regulations were promulgated pursuant to § 110(*c*), 42 U.S.C. § 1857c-5(c) (App. B, 74a) and have been incorporated by reference into the State of Utah's § 110 implementation plan, 40 C.F.R. §52.2346 (1976).

As § 307(b)(1) is the exclusive jurisdictional basis to review the promulgation of any state implementation plan, *Oljato Chapter of Navajo Tribe* v. *Train*, 515 F.2d 654 (D.C. Cir. 1975); *City of Highland Park* v. *Train*, 519 F.2d 681 (7th Cir. 1975), *cert. denied*, — U.S. —, 96 S.Ct. 1141 (1976); *Plan for Arcadia, Inc.* v. *Anita Associates*, 501 F.2d 390 (9th Cir. 1974), *cert. denied*, 419 U.S. 1034 (1974); *Getty Oil Company (Eastern Operations)* v. *Ruckelshaus*, 467 F.2d 349 (3d Cir. 1972), *cert. denied*, 409 U.S. 1125 (1973), the lower court was required to determine the validity of § 52.21(c)(3)(iv) of the regulations.

The Act explicitly directs that any petition to review the promulgation of a state implementation plan is to be filed within 30 days of the promulgation. Failure to file within 30 days precludes any subsequent challenge to the implementation plan unless "the petition is 'based solely on grounds arising after such 30th day.'" *Union Electric Co.* v. *E.P.A.*, — U.S. —, —, 96 S.Ct. 2518, 2523 (1976).

The issue of the regulation's validity is purely legal; further delay in resolving the issue is not in the public interest. To the contrary, the regulation has an immediate impact on Utah's authority and ability to control its air quality. Section 52.21(c)(3)(iv) fundamentally alters the federal-state relationship so carefully written into the Clean Air Act. The matter is ripe for review, and should be resolved to remove the cloud over Utah's primary responsibilities under the Clean Air Act, so that the State may effectively pursue its sovereign rights and duties as contemplated by Congress and as recognized by this Court.

CONCLUSION

For the foregoing reasons, the State of Utah as *amicus curiae* urges this Court to grant the petitions for writs of certiorari.

Respectfully submitted,

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